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Federal Tort Claims Act--Armed Forces--Injury Incident to Military Service

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would be a normal recovery. An action was brought against the United States under the Federal Tort Claims Act, 62 STAT. 983 (1948), 28 U. S. C. §§2674 *et seq.* (1948). *Held*, although members of the armed forces are not expressly excluded from the benefits of the Act, they cannot recover for injuries received incident to military service. Affirmed, *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).

There can be a recovery under the Federal Tort Claims Act for the death or injury of a member of the armed forces while on furlough. *Brooks v. United States*, 337 U. S. 49 (1949), reversing 169 F.2d 840 (4th Cir. 1948). The Supreme Court in that case expressly left open the question of recovery where injury or death occurs incident to military service. And on this point the decisions of the lower courts are in conflict. Recovery has been denied for the death of an officer in a barracks fire. *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949). Meanwhile, in another circuit, recovery has been permitted for the death of a member of the armed forces caused by the negligence of medical personnel. *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949), rehearing denied 1950.

The distinction drawn between the instant case and the *Brooks* case, *supra*, can be traced to the Military Claims Act, 57 STAT. 372 (1943), as amended, 31 U. S. C. §223b (1946), which permitted payments by the Secretary of War in certain cases of injury or death not incident to military service. When the Federal Tort Claims Act was first passed the Military Claims Act and similar statutes were repealed as to claims cognizant under the former. 60 STAT. 846 (1946).

Assuming that the courts would be justified in construing the Federal Tort Claims Act in the light of the Military Claims Act, certain points in regard to the latter should be noted. The Military Claims Act allowed only the recovery of reasonable hospital, medical, and burial expenses actually incurred. Even a soldier who dies while absent without leave is entitled to burial and funeral expenses. 52 STAT. 399 (1928), 10 U. S. C. §916b (1946). Soldiers injured incident to military service are entitled to medical and hospital care by the army; if the enlistment expires while they are hospitalized they can elect to remain in service for hospitalization with pay and allowances until fit for reenlistment or until such recovery is pronounced impossible, 55 STAT. 797 (1941), 10 U. S. C. §628a (1946); if discharged they will be entitled to veterans' hospitalization or pension. REV. STAT. §6493 (1875), 38 U. S. C.

§152 (1946); 38 U. S. C. A. c. 12 (Supp. 1949). Obviously, soldiers injured incident to service would rarely have occasion to incur medical expenses.

The *Brooks* case, *supra*, permitting a recovery for injury and death in line of duty, but not incident to service, theoretically follows the supposed policy laid down by the Military Claims Act. But a \$25,000 recovery, less benefits previously conferred, was approved for the death where under the Military Claims Act only medical and funeral expenses would have been permitted.

The primary objection to actions by members of the armed forces apparently centers around the apprehension of a resulting disruption of military discipline. See *United States v. Brooks*, 169 F.2d 840, 845 (4th Cir. 1948).

It may be that officers are so habitually negligent, or the morale of enlisted men is so low or their greed so great that justice for the soldier will bring dire consequences. However, certain safeguards are provided which should be presumed adequate in the absence of actual evidence of the existence of such deplorable conditions. The action must be brought before a federal judge without a jury. 28 U. S. C. §2402 (1948). Combat activities are outside the Act. Also excluded are actions based on negligence involved in the exercise of discretion, 28 U. S. C. §2680 (1948), which includes such omissions as a failure to attend an army wife in childbirth, *Denny v. United States*, 171 F.2d 365 (5th Cir. 1948), rehearing denied 1949, and such acts as the application of a technically unauthorized punishment. *Wilkes v. Dinsman*, 7 How. 89 (U. S. 1849).

Military authorities would probably favor the denial of recovery for injury or death occurring while not in line of duty because of the disciplinary possibilities involved. See McCOMSEY & EDWARDS, *SOLDIER AND THE LAW* 44 (4th ed. 1945). But it has long been governmental policy to favor those members of the armed forces injured in line of duty which includes those injured while in military hospitals. See KIMBROUGH & GLENN, *AMERICAN LAW OF VETERANS* §§13, 15 (1946). At one time the line of duty status closely approximated a reasonable definition of "incident to military service." See *Rhodes v. United States*, 79 Fed. 740 (8th Cir. 1897).

It is submitted that, as a matter of principle, a rule which will discriminate against a soldier because he was actively performing a military service is as difficult to justify as was the absolute exclu-

sion of members of the armed forces. But see Note, 58 YALE L. J. 615 (1949). In either case the usual pensions given regardless of tort are an inadequate remedy for members of the armed forces whose life expectancy has been materially reduced, or for the families of those killed.

Since a private bill cannot be introduced into Congress if the Federal Tort Claims Act provides a remedy, 60 STAT. 831 (1946), 2 F. C. A. 28g (Cum. Supp. 1947), it may be necessary to bring an action in many cases to determine whether or not the Act or situation was incident to or merely service connected.

T. W. C.